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Nos. 07-984 & 07-990

IN THE
Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

The question in this case is whether the issuance of a permit by the U.S. Army Corps of Engineers ("Army Corps" or "Corps") authorizing petitioner Coeur Alaska, Inc., to discharge millions of gallons of wastewater containing tailings from its gold mine into a pristine lake that is a navigable water of the United States violates the Clean Water Act ("the Act"). The Ninth Circuit answered that question in the affirmative.

This brief in support of respondents is filed on behalf of the following Members of Congress: Frank Pallone, Jr., Pete Stark, Maurice Hinchey, Donald Payne, Raul Grijalva, Jan Schakowsky, Rosa DeLauro, Rush Holt, Mike Honda, Dennis Kucinich and Earl Blumenauer. *Amici* are Members of a number of Committees that have jurisdiction over environmental matters, including the Natural Resources Committee, the Energy and Commerce Committee, the Education and Labor Committee, the Ways and Means Committee, and the Appropriations Committee. *Amici* have a strong interest in ensuring the Act is properly implemented. Each *amicus* represents a district containing navigable waterways potentially affected by

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to its preparation or submission. No person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission. This brief is filed with the written consent of the parties, which is on file with the Clerk of the Court.

the outcome of this case.

At bottom, this case presents a question of congressional intent — namely, whether Congress gave the Army Corps the authority to issue a permit allowing the discharge of industrial pollutants into navigable waters that the Act otherwise forbids. *Amici* are uniquely situated to address this question. Although *amici* submit this brief in their individual capacities, not on behalf of Congress, their views are informed by their considerable experience as Members of Congress.

In *amici's* view, the Ninth Circuit correctly ruled that the permit issued by the Army Corps violated the Act. The Act mandates uniform compliance with discharge standards for industrial wastes established by the Environmental Protection Agency ("EPA"). The Corps' limited authority to issue permits for construction and navigation projects in no way supplants EPA's exclusive authority over waste disposal. Indeed, the position advocated by petitioners disregards the Act's clear text, invites an end-run around EPA's sole authority to authorize the discharge of wastewater, and gives mining companies incentives to dump their wastes into rivers and lakes and not on land. Adopting petitioners' approach would promote large-scale dumping of industrial wastes into the waters of the United States — exactly the dumping the Act was designed to end.

BACKGROUND

1. The permit in question in this case was issued by the Army Corps to grant Coeur Alaska, Inc., permission to discharge contaminated waste, known as process wastewater, directly into waters of the United States. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 640 (9th Cir. 2007) ("*SEACC*"). Section 402 of the Act gives EPA exclusive authority to issue permits for the discharge of industrial pollutants. 33 U.S.C. § 1342. Section 404 of the Act provides a limited exception to EPA's otherwise exclusive permitting authority by granting to the Army Corps the power to issue "dredge and fill" permits for the placement of "fill material" into waters of the United States — that is, when it is necessary to use "fill" to construct bridges, dams, piers, or other infrastructure, or to alter water flow to facilitate navigation. 33 U.S.C. §§ 1344, 1344(f). Nothing in Section 404 authorizes the Army Corps to issue permits for the discharge of industrial pollutants or, for that matter, waste products of any kind.

To ensure that no discharge of industrial wastes regulated by the Act deviates from EPA standards, Sections 301 and 306 of the Act subject *all* discharges to uniform discharge standards set and administered by EPA. And EPA has, in fact, set a zero discharge standard for precisely the kind of gold-mine waste Coeur Alaska seeks to discharge. In 1982, EPA conducted a survey of waste disposal methods in use at gold mines across the nation and concluded that waste disposal techniques resulting in zero discharge into waters of the United States were routinely and cost-

effectively employed. 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982); 47 Fed. Reg. 25,682, 25,692 (June 14, 1982). For this reason, EPA established a "zero discharge" standard for gold mines that use the froth-flotation process to separate valuable ore from waste, as would Coeur Alaska's mine. *See* 40 C.F.R. § 440.104(b)(1). There is no question that, had Coeur Alaska sought a permit from EPA, the application would have been denied under EPA's twenty-six-year-old zero discharge rule.[2]

2. Coeur Alaska instead sought a permit from the Army Corps under Section 404 of the Act, which authorizes the Corps to issue "dredge and fill" permits, to allow its Kensington Mine to discharge heavily polluted wastewater into Lower Slate Lake. *See SEACC*, 486 F.3d at 640. Coeur Alaska plans to extract gold from the Kensington Mine and then separate it from waste rock using a process known as froth-flotation. *Id.* at 641. Coeur Alaska will remove rock from the mine, grind it into fine gravel, and pump it (along with various chemicals) into large water tanks where the froth-flotation process occurs. *Id.* The addition of chemicals causes bubbles to form around the gold-bearing ore and float to the top of the tank, where the ore is skimmed off. *Id.* Some of the remaining material — known as tailings — can be re-deposited in the mine. But a significant amount (as

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[2] This standard effectively requires Coeur Alaska to dispose of waste products from its froth-flotation mill either on land or in protected impoundments such as artificial ponds lined with impermeable membranes. *SEACC*, 486 F.3d at 641.

much as 4.5 million tons in this instance) must be discarded elsewhere. *Id.*

In 1997, Coeur Alaska sought and was granted a permit to build a dry tailings facility on land near the mine, which would not have involved the discharge of wastewater. *Id.* at 641-42. Rather than spend money to build the facility, Coeur Alaska instead proposed in 2001 to dam nearby Lower Slate Lake and use the lake as a dump site for the tailings-laden wastewater, which would be discharged into the lake in the form of a semi-liquid "slurry." This discharge would raise the bottom of the lake by approximately fifty feet and cause the lake's surface area to triple in size. *Id.* The wastewater contains a number of toxic substances, including aluminum, chromium, copper, lead and mercury, which would cause substantial environmental damage to this pristine lake and adjacent wetlands. *Id.* at 642; *see also* Respondents' Br. at 4. Coeur Alaska applied for, and received, a permit from the Corps under Section 404 of the Act. This is the first time the Corps has issued a permit allowing a gold mine operator to discharge process wastewater into waters of the United States.

The Corps' issuance of this permit was a departure from the Corps' longstanding interpretation of its authority under Section 404. Until 2002, the Corps took the position that its permitting authority over "fill" was limited to fill used for construction or navigation. In 1975, the Army Corps defined "fill material" to mean material used to replace an aquatic area with dry land or to raise the elevation of a water body. 40 Fed. Reg. 31,320, 31,325 (July 25, 1975). In

1977, the Corps clarified that "fill material" is material used for the "primary purpose" of construction or for navigational safety. *See* 42 Fed. Reg. 37,122, 37,145 (July 19, 1977). In contrast, if material was placed in a water body "primarily to dispose of waste," the waste was not fill material and thus EPA, not the Corps, had jurisdiction under Section 402. *Id.*

In 2002, the Army Corps redefined "fill material" to embrace anything at all that, when dumped in a water body, raises the elevation, and abandoned the "primary purpose" test for waste. 67 Fed. Reg. 31,129 (May 9, 2002). Because industrial wastes sink to the bottom of a water body and raise its elevation, the Corps' expanded definition of "fill" threatened to arrogate authority the Act assigns to EPA. To avoid dispute over their respective jurisdiction, the Army Corps, together with EPA, appended to the new definition a statement clarifying that neither agency's authority would change as a result of the rule-making. *Id.* at 31,130; *see also id.* at 31,135.

In 2005, however, the Army Corps did an about-face and issued a "dredge and fill" permit to Coeur Alaska. The permit authorizes the discharge of 210,000 gallons of wastewater daily into the Lower Slate Lake; a discharge that cannot be reconciled with EPA's zero discharge standard. If the discharge is allowed to proceed, it will result in millions of gallons of wastewater contaminated with chemicals and containing 4.5 million tons of suspended solids such as pulverized lead and mercury being flooded into a pristine lake surrounded by wetlands in the Tongass National Forest. *SEACC*, 486 F.3d at 642. The lake

would be rendered a "dead lake," unable to sustain life and unsuitable for human use, and the pollution would spread to nearby wetlands, causing untold environmental harm. *Id.*

3. Three conservation organizations, Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation, challenged the Corps' decision in United States District Court for the District of Alaska. These groups contended that Coeur Alaska's actions were governed by the National Pollution Discharge Elimination System (NPDES) permitting program set up under Section 402 of the Act, and in particular by the 1982 EPA regulation prohibiting the "discharge of process wastewater to navigable waters from mills that use the froth-flotation process." Coeur Alaska and the State of Alaska intervened on behalf of the Corps and filed a motion for summary judgment, which the district court granted. *Id.* at 643.

The Ninth Circuit reversed. In finding the Corps' permit invalid, the court relied on the text of Sections 301 and 306 of the Act, which make unlawful *any* discharge that does not comply with applicable effluent and performance standards. *Id.* at 646-48. In so holding, the court rejected Coeur Alaska's argument that Congress had created an implied exemption for permits sought under Section 404. Instead, the court found that Congress intended the existence of a discharge standard or limitation implemented through Section 402 to preclude the issuance of a Section 404 permit. *Id.* at 647-48.

The court also noted that when the two permitting agencies — EPA and the Corps — promulgated a joint regulation regarding fill material in 2002, both the regulation and their joint statements emphasized the continuing applicability of previous discharge standards and permitting practices. *Id.* at 651-53. Because EPA promulgated a standard for process wastewater of the type the Kensington mine will produce well prior to 2002, the court concluded that the Corps' issuance of a permit to Coeur Alaska was at odds with the agencies' position that the Corps lacked authority to issue a permit under Section 404 where, as here, a discharge standard is in force. *Id.* at 653.

SUMMARY OF ARGUMENT

Amici join in respondents' more comprehensive treatment of the issues in this case. *Amici* file this brief to highlight two points:

First, the Clean Water Act refutes petitioners' claims. The Act prohibits the Army Corps from issuing permits that authorize the discharge of process wastewater into our nation's navigable waters. Indeed, the Act was passed for the very purpose of maintaining and improving the quality of the nation's waters by reducing pollution. 33 U.S.C. § 1251(a). The Act does so by directing EPA to control the disposal of waste into waters of the United States. *Id.* § 1342. At the same time, the Act withdrew the expansive authority previously exercised by the Army Corps under the Refuse Act, confining the Army Corps to discrete power to issue "dredge and fill" permits to enable construction

of infrastructure projects like jetties and piers, so long as they do not obstruct navigation. *See id.* § 1344. Congress reposed authority only in EPA — not the Army Corps — to license waste disposal in waters of the United States. *Id.* § 1342.

This reading of the Act is confirmed by the Act's history. One event leading to the enactment of the Act was the wholesale discharge of mining wastes into the Great Lakes. The Act was passed to eliminate dumping of industrial waste into our nation's rivers and lakes, and, in the interim, to ensure that no dumping takes place without EPA's approval. *See generally Reserve Mining Co. v. EPA*, 514 F. 2d 492 (8th Cir. 1975). *Amici's* reading of the Act is also confirmed by EPA's interpretation of the Act as forbidding the "discharge of process wastewater to navigable waters from mills that use the froth-flotation process."

Second, petitioners' argument should be rejected because it flies in the face of longstanding, consistent administrative interpretation by both EPA and the Army Corps, which holds that only EPA, and not the Corps, may authorize discharges subject to an effluent standard issued by EPA.

Petitioners' argument is further flawed because it seeks to expand the term "fill material" far beyond its established meaning. Petitioners claim that mine waste contains materials similar to fill, and therefore the Army Corps properly issued Coeur Alaska a permit under Section 404 of the Act. 33 U.S.C. § 1344. But this argument collides with the unavoidable fact that

the word "fill" is a term of art: It refers to material used to fill a space to facilitate construction. By no stretch is "fill" a synonym for "waste" or "any collection of solid materials," as petitioners claim. Indeed, petitioners' argument has no limiting principle. If their reading of the statute were correct, a company could get a Corps permit to dump any pollutant into navigable waters of the United States by calling it "fill," so long as it would raise water levels, even if the waste's discharge was otherwise forbidden by EPA, and even if the discharge was only for waste disposal.

The Army Corps' unprincipled departure from these settled administrative interpretations threatens to destabilize a statutory and regulatory regime that, by and large, has operated as Congress directed in the Act. The Ninth Circuit was right to invoke principles of regulatory consistency in vacating the permit the Corps issued to Coeur Alaska.

ARGUMENT

I. The Clean Water Act Vests EPA With Exclusive Authority To Issue Permits Authorizing The Discharge Of Industrial Wastes.

The question in this case is whether the Clean Water Act authorizes the Army Corps to issue a discharge permit to Coeur Alaska allowing contaminated wastes to be dumped into waters of the United States. Answering that question "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any

precedents or authorities that inform the analysis." *Dolan v. United States,* 546 U.S. 481, 486 (2006). *See also Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000 (2007). The text, purpose, history, and longstanding administrative interpretation of the Act all point in the same direction: Only EPA may issue a permit authorizing the discharge of waste into the navigable waters of the United States.

A. The Act's Text.

The Act's core goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by "elimin[ating]" the "discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a). To accomplish this goal, Sections 301 and 306 of the Act require EPA to establish pollution control standards that must be imposed on all industrial and municipal discharges pursuant to the NPDES permitting program under Section 402. 33 U.S.C. §§ 1311, 1316, 1342. *See also, e.g., Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002) (stating that the imposition of standards via the Section 402 permit program is the "cornerstone" of the Act); *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977) (stating that Section 402 permitting is "central to the enforcement" of the Act).[3]

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[3] The Clean Water Act received broad backing as a much-needed pollution control measure. The 92nd Congress conducted a major review of existing water pollution laws (continued...)

Section 402 of the Act grants EPA exclusive authority to issue permits for the discharge of waste — including industrial waste — into the waters of the United States. According to Section 402, "[p]ermits for discharges associated with *industrial activity* shall meet all applicable provisions of this section." 33 U.S.C. § 1342(p)(3) (emphasis added). There is no question that mining is an "industrial activity," and not an infrastructure project like the construction of a bridge, dam or pier. Therefore, any discharge of mining waste into the waters of the United States must be authorized by a permit issued in accordance with Section 402, or the discharge is unlawful.[4]

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[3](...continued)
and enacted the Federal Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act. The Act passed the Senate unanimously and the House by an overwhelming majority. Senate Report and Debates, *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972* (hereinafter "*ALH*") at 222; House Report and Debates, *ALH* at 277. President Nixon vetoed the bill because of fiscal concerns. *See* Federal Water Pollution Act—Veto Message, Oct. 17, 1972, *ALH* at 137. Congress overrode that veto with landslide votes. *See* House Debate on Overriding the President's Veto of S. 2770, *ALH* at 95-96, 109-13; Senate Debate on Overriding the President's Veto of S. 2770, *ALH* at 135-36.

[4] In contrast, Section 402(*l*)(2), states that NPDES permits *are not* required for mine runoff that *has not* been contaminated with mine waste:

> The Administrator shall not require a permit under
>
> (continued...)

Section 301 drives home that the Act's pollution control standards are not discretionary and that any permit under Title IV, which embraces Sections 402 and 404, must comply with those standards. Section 301 provides that, "[e]xcept as in compliance with this section *and* sections 1312, 1316, 1317, 1328, 1342, *and* 1344 of this title, the discharge of *any pollutant* by *any person* shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). *See also Rapanos v. United States*, 547 U.S. 715, 723 (2006) (stating that Section 301's prohibition is one of the "principal provisions" of the Act).

Congress's crafting of Section 301 merits close attention. First, Congress used the connector "and" in setting out the general rule that "[e]xcept as in compliance with this section *and* sections . . . of this title," including Sections 306, 402 and 404, the discharge of pollution "shall be unlawful." Congress's

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[4](...continued)
this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations . . . which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

§ 402(*l*)(2). This provision makes sense because permits *are* required under Section 402 for any mine runoff which *has* been contaminated by mine waste. Subsection (*l*) would make no sense under petitioners' reading of the Act.

use of "and" instead of "or" was deliberate. *See, e.g.*, *Garcia v. United States*, 469 U.S. 70, 74 (1984); *Reiter v. Sonotone*, 442 U.S. 330, 338-39 (1979). As the text makes clear, Congress did so to ensure that *every* permit issued under the Act complies with the pollution control requirements of Section 301 *as well as* the separate and additional requirements of the section authorizing the issuance of the permit. *SEACC*, 486 F.3d at 655. *See also S.D. Warren v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 376-78 (2006) (giving text of Clean Water Act everyday meaning).

Second, and of equal significance, Congress's repeated use of the word *any* underscores Section 301's breadth. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997); *United States v. James*, 478 U.S. 597, 604 (1986). The Section was plainly written to ensure that "the discharge of *any pollutant* by *any person*" is unlawful, unless the person has obtained a permit that complies with Section 301. There is no exception to this requirement; the provision's language is categorical.[5]

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[5] This understanding of the Act was widely shared at the time it was being drafted. In comments on the draft legislation, EPA's Administrator observed that "[e]ffluent limitations required by Section 301 would be established and applied to all point sources of discharges covered by the Act by means of the permits issued under Title IV." H.R. Rep. No. 92-911, *reprinted in ALH,* at 844. *See also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) ("It is clear that Congress intended these [Section 301] regulations to be absolute prohibitions.").

Another section reinforces *amici's* reading of the Act. Section 306(e) provides that it "shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e). Again, Congress's repeated use of the word "any" drives home the categorical nature of this prohibition — the provision makes it unlawful for *any* operator of *any* new source to violate *any* applicable performance standard, period. There is no way to square the Corps' issuance of discharge permit to Coeur Alaska with the unambiguous dictate of Section 306(e). There is no dispute that the Kensington mine is a "new source" subject to EPA's zero discharge standard. Nor does the language suggest an exception. Thus, in the language of Section 306(e), a discharge of waterborne mining wastes into waters of the United States would be "in violation" of a "standard of performance applicable to such source."

This reading of the Act is also consistent with, and preserves, the narrow authority the Act confers on the Army Corps to issue permits. Under Section 404, the Army Corps' permitting authority is limited to "dredge and fill" construction and navigation projects; it does not extend to the disposal of industrial wastes. 33 U.S.C. § 1344.

Section 404 of the Act makes this clear in two ways. To begin with, Subsection 404(f)(1) describes operations with "dredge and fill" components *exempted* from regulation. 33 U.S.C. § 1344(f)(1). These operations include: farming; water conservation; maintenance and reconstruction of pre-existing

structures "such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures"; "construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters"; and "construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment," so long as navigable waters are "not impaired" and "any adverse effect on the aquatic environment" is minimized. 33 U.S.C. § 1344(f)(1)(A)-(F). The words "construction" and "navigation" run through these descriptions of exempted dredging and filling activities for a reason — dredging and filling are activities integral or related to construction and infrastructure projects. *See id.*

Next, Subsection 404(f)(2) defines those "dredge and fill activities" that are *not* exempted and therefore may not be undertaken without a permit. Under Subsection (f)(2), a permit is required for the "[1] discharge of dredged or fill material into the navigable waters *incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject*, [2] where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2) (emphasis added). The first clause defines the discrete *scope* of the Army Corps' jurisdiction, encompassing only discharges that are incidental to construction activities requiring deposits into waters — such as the building of bridges or dams — that might have an impact on navigation. *Id.* The second clause sets forth the *purpose* for which a permit may be issued

by the Corps, which is to ensure the safety and non-obstruction of navigable waters. *Id.* Read together, the two subsections of Section 404(f) make evident that the Corps' permitting authority is limited to activities undertaken for purposes relating to "dredge and fill" operations; that is, operations necessary for infrastructure development and navigation in waters of the United States.

The text of the Act resolves this case. The "dredge and fill" permit the Army Corps issued to Coeur Alaska is invalid not just because its issuance exceeded the Corps' authority under Section 404, but also because the permit violates Section 301's "absolute prohibition" on the discharge of waste without a permit properly issued by EPA under Section 402 of the Act, as well as Section 306(e)'s prohibition against discharges by "new sources" in violation of EPA established performance standards.

B. The Act's History and Purpose Support Amici's Reading.

This conclusion is bolstered by a review of the drafting history of the Act. One of Congress's chief concerns was to eliminate the exact kind of discharge Coeur Alaska seeks permission for — that is, the dumping of process wastewater or waterborne solid waste into waters of the United States. At the time the Act was making its way through Congress, several Members of Congress were trying to force the Reserve Mining Company to stop dumping 67,000 tons of taconite tailings daily into Lake Superior. *See, e.g.,* Senate Consideration of the Report of the Conference

Committee, Oct. 4, 1972, *reprinted in ALH* at 190-94 (remarks of Sen. Griffin of Michigan); *see also Reserve Mining Co. v. EPA*, 514 F.2d 492, 530-31 (8th Cir. 1975). Reserve Mining operated a taconite mine in Minnesota's Mesabi Iron Range, but placed its mill (the beneficiation plant) on the shore of Lake Superior. *Id.* at 500. Reserve Mining had been dumping process wastewater into the lake for decades, causing extensive water contamination and threatening the safety of residents who drank the lake water and used the lake for fishing and recreation. *Id.* at 530-31. The Act was designed in part to put an end to that dumping. *See* 33 U.S.C. § 1311, 1316, 1342.

Prior to the passage of the Clean Water Act, the Army Corps was responsible for regulating deposits into waters of the United States, including waste disposal, under the Rivers and Harbors Appropriation Act of 1899. The Corps had issued permits for construction, deposits of fill and other potential obstructions to navigation under Section 10 of that Act (33 U.S.C. § 403), and had recently instituted a permit program for industrial waste discharges under Section 13 (33 U.S.C. § 407), more commonly known as the Refuse Act. The Clean Water Act transferred to EPA responsibility for permitting and standard-setting for waste discharges, leaving the Corps to administer only the construction and navigation-related dredge and fill permitting process.

The impact of this near-total reallocation of authority was evident in the *Reserve Mining* case. Just three years after the Act's passage, the U.S. Court of Appeals for the Eighth Circuit concluded that the

Reserve Mining Company's dumping of process wastewater into Lake Superior, conducted pursuant to a permit issued under 33 U.S.C. § 403 (Section 10 of the Rivers and Harbors Act) authorizing the company to "deposit tailings from the ore processing mill" into the lake, was now subject to the NPDES permit program authorized under Section 402 of the Clean Water Act. *See Reserve Mining*, 514 F.2d at 531. In the court's view, Reserve Mining's most recent application for a Refuse Act permit to discharge process wastewater into Lake Superior, submitted to the Army Corps in 1971 but not acted on, automatically had been converted into an NPDES permit application under Section 402 upon the Clean Water Act's enactment. *See id.* The Eighth Circuit concluded that, while the original permit Reserve Mining had received from the Army Corps in 1960 remained valid with regard to the navigational impacts of Reserve Mining's dumping — the *only* impacts assessed by the Army Corps — that permit was not sufficient to authorize Reserve Mining's ongoing discharge of industrial wastes. *Id.* at 532. At no point did the court even consider that the discharge of process wastewater might be permitted under the Corps' Section 404 dredge and fill authority, undoubtedly because mine waste clearly did not constitute "fill." *Id.*[6]

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[6] The court's treatment of Reserve Mining's permit is consistent with the mandate of 33 U.S.C. § 1342(a)(5). It also accords with Congress's statement that "Section 402 transfers the 1899 Refuse Act permit program from the Corps of Engineers to the Administrator [of EPA]." *ALH* at 321. *See also ALH* at 274 ("Section 402 transfers the (continued...)

Until the Corps' issuance of the Coeur Alaska permit, the Act was always understood to vest EPA with sole authority to issue permits for wastewater discharges. This understanding is evident not just in the *Reserve Mining* case, but in others as well. For example, just four years after the Act took effect, the Homestake Mining Company was required to obtain a Section 402 permit subject to pollution control standards under Sections 301 and 306 before it could discharge "waste water containing tailings, heavy metals, and suspended solids" from its South Dakota gold mine into navigable waters. *United States v. Homestake Mining Co.*, 595 F.2d 421, 422-23 (8th Cir. 1979). Also in the 1970s, Iron Mountain Mines, Inc., was required to obtain a Section 402 permit for discharges from a California mine that produced gold and other ores. *United States v. Iron Mountain Mines, Inc.,* 812 F. Supp. 1528, 1540 (E.D. Cal. 1992) (addressing liability issues).

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[6](...continued)
[discharge permit program] from the Army Corps to the EPA, and provides a mechanism for the States to assume full jurisdiction."). Indeed, after the Act's passage in 1972, the Army Corps ceded jurisdiction to EPA over all pending applications under the Refuse Act. *See, e.g.*, Highlights of the Bill, Conference Report from House Debate, *ALH* at 362 ("Pending applications under the Refuse Act program would be transferred from the Corps of Engineers who are administering the 1899 Refuse Act to the Environmental Protection Agency who would initially be responsible for the administration of the new program.").

As a final point, petitioners' argument, if accepted, would not only end run the Act's pollution control requirements, but would also defeat the Act's goal of uniform treatment for companies engaged in waste discharge. The National Association of Home Builders ("NAHB") suggests the standards imposed by Sections 301 and 306 are superfluous because the Army Corps conducts an extensive analytical process before issuing a Section 404 permit to ensure that no serious environmental harm will result. But the case-by-case evaluations that NAHB touts and that the Corps conducts cannot supplant EPA-issued standards. Congress drafted the Clean Water Act to require EPA to set industry-wide, science-based effluent standards which take into account the burden a standard would place on an industry. According to the 1972 Conference Report, "The conferees intend that the [EPA] Administrator . . . will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination." *ALH* at 304. Although a permit applicant may seek an exception from an industry-wide standard, the burden is a high one. *See, e.g.*, 33 U.S.C. § 1311(c). The case-by-case environmental review NAHB favors thus is exactly the system that Congress rejected in the Clean Water Act.[7]

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[7] The NAHB's argument also confuses the distinctly different roles served by EPA's standard-setting and the Corps' environmental review. EPA's job is to set uniform, science-based discharge limits for industrial and municipal discharges. The Corps' review, in contrast, focuses on the

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As is evident, the Act's text, purpose, and history demonstrate that only EPA, and not the Corps, may issue permits for the discharge of waste into waters of the United States. Accordingly, the judgment below should be affirmed.

II. The Corps' Permit Is At Odds With Settled Administrative Interpretation Of The Clean Water Act.

Not only did the Corps' issuance of a permit to Coeur Alaska violate the Clean Water Act, it also cannot be squared with longstanding administrative interpretations of the Act on two key points — first, the strict limits on the Corps' "dredge and fill" permitting authority under Section 404 and second, the meaning of the term "fill material." The Corps' unexplained and unprincipled departure from these long settled agency views is yet another reason to affirm the Ninth Circuit's ruling.

A. The Corps' Authority Under Section 404 Does Not Extend to Issuing Permits for the Discharge of Mining Wastes as "Fill Material."

As noted, the Act was passed in 1972. By 1976, the Army Corps had formally adopted definitions for

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[7](...continued)
environmental consequences of dredge and fill operations, which can damage aquatic life and wetlands. *See* 33 U.S.C. §§ 1344(c), (f)(1)(E).

"fill material" and the "discharge of fill material," which acknowledged that the Corps' authority was limited to permits for fill needed for construction and navigation projects. The Corps defined "fill material" as material "used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose," and "[d]ischarge of fill material" as "the addition of fill material into navigable waters for the purpose of creating fastlands, elevations of land beneath navigable waters, or for impoundments of water." 33 C.F.R. §§ 209.120(d)(6), (7) (1976). In 1977, the Army Corps clarified that waste materials were *excluded* from its definition of fill materials. 42 Fed. Reg. at 37,145 (excluding "any pollutant discharged into the water primarily to dispose of waste"). At no point did the Corps suggest that it could issue permits authorizing the discharge of wastewater.

In the ensuing decades, the Army Corps repeatedly reaffirmed its view that "fill material" "does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act." 33 C.F.R. § 323.2(m) (1977); 33 C.F.R. § 323.2(e) (2001). According to the Army Corps' "primary purpose test," if material was placed in a water body for the "primary purpose" of waste disposal, EPA had permitting jurisdiction under Section 402. *See* 42 Fed. Reg. at 37,145. Following that approach, a Memorandum of Agreement ("MOA") between the Army Corps and EPA in 1986 listed mining wastes among those discharges that required permits from EPA under Section 402. 51 Fed. Reg. 8,871, 8,872

(Mar. 14, 1986). The MOA also specified that a discharge "in liquid, semi-liquid, or suspended form" would be permitted by EPA pursuant to Section 402, as well as "a discharge of solid material of a homogeneous nature normally associated with single industry wastes." *Id.* Discharges requiring permits from the Corps under Section 404 included discharges having as their "primary purpose" or "one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation," or discharges resulting "from activities such as road construction or other activities where the material to be discharged is generally identified with construction-type activities." *See id.* at 8,872; *see also* 53 Fed. Reg. 20,764 (June 6, 1988).

To be sure, in 2002 the Army Corps changed course when it adopted a new regulatory definition of "fill material" that included any material the discharge of which has the effect of elevating a water body, regardless of whether the discharge is for construction or navigation. 67 Fed. Reg. at 31,130. The breadth of this new definition, coupled with the Corps' abandonment of its "primary purpose" test, raised questions about whether the Corps was encroaching on the EPA's permitting authority under Section 402.

To avoid jurisdictional conflict, EPA and the Army Corps issued a joint statement that "this final rule will not modify existing regulatory practice." 67 Fed. Reg. at 31,130. The agencies also agreed that not *every* discharge with the effect of elevating water levels could be considered fill material. In the proposed rule, the agencies stated that no discharge subject to an

EPA standard under Section 306 would be considered "fill material." 65 Fed. Reg. 21,292, 21,299 (Apr. 20, 2000). In the final rule, the agencies explained that they had deleted the clause excluding discharges already subject to EPA standards because of concerns raised in public comments that the language was "vague" and "would result in uncertainty." 67 Fed. Reg. at 31,135 ("In light of the concerns and confusion associated with the proposed provision, we have decided to delete it from the rule."). Instead, the agencies specified that the re-definition would not change permitting jurisdiction with regard to discharges containing solids (such as mining waste):

> Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.

Id. The final rule also contains exceptions for trash and sewage, which also would have fit squarely within the new definition of fill material had they not been exempted. *See* 33 C.F.R. § 323.2(e)(3). In short, the 2002 rule-making maintained the *status quo* and reaffirmed both agencies' longstanding recognition that

discharges subject to EPA-established effluent limitations are required to be regulated by EPA under Section 402.

The permit issued by the Corps to Coeur Alaska violates these understandings. As stated above, for over two decades EPA has imposed an industry-wide zero discharge standard on froth-flotation mills such as the one planned by Coeur Alaska, pursuant to the NPDES permit program. *See* 40 C.F.R. § 440.104(b)(1) ("there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores"). In addition, the 1986 MOA committed the Corps to defer to EPA to permit mine waste as well as other waterborne suspended solids, *see* 51 Fed. Reg. at 8872, a commitment the Corps explicitly reaffirmed during its 2002 rule-making.

Therefore, according to the Corps' promise to maintain the regulatory *status quo*, it should have let EPA decide whether to issue a permit for Coeur Alaska's planned discharge of process wastewater under Section 402. It did not. Instead, in 2005, the Army Corps disregarded both the MOA and the statements it made along with EPA and issued a Section 404 permit to Coeur Alaska. Making matters worse, the Corps did not acknowledge, let alone explain, why it changed course. The Army Corps' failure to do so violates the longstanding rule that an administrative agency must acknowledge and provide a reasoned justification when it diverges from past practice or policy. *See, e.g., Motor Vehicle Mfrs. Ass'n*

v. State Farm Mut. Auto. Insur. Co., 463 U.S. 29, 42-43 (1983). The Ninth Circuit was right to invalidate the Corps' permit on this ground as well.

B. The Corps' Permit Is Contrary to Settled Understanding of the Meaning of the Term Fill Material.

The Corps has violated principles of reasoned agency decision-making in yet another way: It has robbed the term "fill material" of any meaning. As explained above, the Corps' permitting authority under the Clean Water Act is limited to permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). In an effort to arrogate authority denied to it by Congress, the Corps has redefined "fill material" to cover virtually any substance that can be dumped into water so long as it raises the water level. But the term "fill material" is a term of art that does not encompass "waste," especially where, as here, the discharge is unrelated to any construction or navigation project.

The terms "fill" and "fill material" are terms with well-established meanings that the Corps is not free to dismiss. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meanings . . . a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); *accord United States v. Wells*, 519 U.S. 482, 491 (1997). "Fill material" is a term of art in the engineering field, referring to an aggregated material that, when deposited in a space or

gap, enhances stability. According to the Oxford English Dictionary, in the 1800s a "fill" was "an embankment to fill up a gully or hollow," used, for example, in conjunction with "cuts" (*i.e.*, grooves or ditches) for laying railroad tracks. 5 Oxford English Dictionary 908 (2nd ed. 1989) (def. I(2)(b)). In 1972, the year the Act was enacted, the American Society of Civil Engineers defined "fill" by its verb and noun forms as: "Use of material, or material used to equalize or to raise topography to a certain grade." American Society of Civil Engineers, Definitions of Surveying and Associated Terms 69 (1972). EPA's website currently defines "filling" as the act of "[d]epositing dirt, mud or other materials into aquatic areas to create more dry land, usually for agricultural or commercial development purposes, often with ruinous ecological consequences." EPA, Terms of Environment, http://www.epa.gov/OCEPAterms/fterms.html (May 14, 2007).

Building codes and construction ordinances offer even more precise definitions of fill material and "filling," none of which extends to waste. For instance, Falmouth Maine's building code states that "[f]ill material shall mean clean soil material, rocks, bricks, and cured concrete, which are not mixed with other solid or liquid waste, and which are not derived from an ore mining activity." Falmouth, Me., Code ch. 601 § 5.34 (1991, 2003).

In the 1970s, "fill material" was used for many purposes, such as to embank roads, extend airport runways, or reclaim portions of a water body as dry land. *See, e.g.*, *V.C. Edwards Contracting Co., Inc. v.*

Port of Tacoma, 503 P.2d 1133, 1136-37 (Wash. Ct. App. 1972) (involving placement of "fill material" for road embankment); *Traigle v. Lafayette Airport Comm'n*, 309 So.2d 904, 905 (La. Ct. App. 1975) (involving use of "fill material" to construct runway); *Agerton v. City of Lake Charles*, 273 So.2d 353, 354 (La. Ct. App. 1973) (involving placement of "fill material" to reclaim dry land). Fill material was valued as a saleable commodity, not mere waste. *See, e.g.*, *Rheault v. Tennefos Constr. Co., Inc.*, 189 N.W.2d 626, 627-28 (N.D. 1971) (regarding unfulfilled contract to furnish "fill material" at cost of $11,706 for use in road-building).[8]

The Corps itself consistently embraced these settled definitions of the terms "fill" and "fill material," in formal regulations, the MOA, and other statements of agency policy. *See infra* at pp. 22-25. Despite the "accumulated settled meanings" of the terms fill and fill material, *see Amax Coal*, 453 U.S. at 329, petitioners now contend that fill can mean any material that can be dumped into water that might raise the water level.

Petitioners' argument has no limiting principle. If petitioners' reading of the statute is correct, a

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[8] To be sure, fill material can contain recycled content. Fill material often contains recycled and inexpensive materials such as rock, gravel, sand, compacted soil, glass chips, or concrete, depending on its engineering function, but must be of a compaction density, moisture content, and shear strength suited to its use. *See, e.g.,* 4 Bruner & O'Connor Construction Law § 14:10.

company could dump any pollutant into navigable waters of the United States and call it "fill," even if the material's discharge was otherwise forbidden by EPA and even if the discharge was only for waste disposal and not for construction or navigation. Any number of harmful substances currently regulated by EPA would become fair game, including wastes from dairy products processing, grain mills, seafood processing, cement manufacturers, leather tanning and finishing facilities, and timber products operations. *See* 40 C.F.R. parts 405, 406, 408, 411, 425, and 429. There would be little the Corps could *not* permit mining and other companies to dump in waters of the United States — including toxic mine tailings containing unlimited amounts of asbestos, arsenic, cyanide, and sulphuric acid. Indeed, Coeur Alaska seeks to dump waste containing mercury and lead. The Army Corps cannot be allowed to cloak this discharge of toxic wastes by calling it "fill."

Because the permit the Corps issued to Coeur Alaska cannot be reconciled with longstanding agency interpretations of the Corps' role under the Act and the meaning of "fill material," the Ninth Circuit properly set it aside.

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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